



Recent Amendment, Practical Issues & Case Studies in FEMA

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Recent Amendments under FEMA



Recent Developments

CRACKDOWN ON ROUND TRIPPING

ODI Plans to Face Stricter Scrutiny

RBI to form Indian entities RBI has sent

Panel to review overseas direct investments

Nods Fast-tracked for Cos with Minor China, HK Investments

Inter-ministerial committee set up to assist home secy-headed panel vet the proposals

REVAMP OF STANDARD OPERATING PROCEDURE

New Guidelines in Works to Speed up FDI Approvals

Likely to detail the time ministries can take to give clearances

Government of India
Ministry of Commerce & Industry
Department for Promotion of Industry and Internal Trade
(FDI Division)

Consolidated FDI Policy Circular of 2020

Subject: Consolidated FDI Policy

The "Consolidated FDI Policy" is attached.

2. This Circular will take effect from October 15, 2020

Amendment to curb the opportunistic takeover

- ❖ For curbing opportunistic takeovers/acquisitions of Indian companies due to the current COVID-19 pandemic, **amendment has been brought out in Rule 6(a) of the FEM (Non-debt Instruments) Rules, 2019.**

Revised Position – Rule 6(a) of FEM (NDI) Rules, 2019

PROI may make investment as under:- (a) may subscribe/ purchase/ sell equity instruments of an ICo in the manner and subject to the terms and conditions specified in Schedule I:

“Provided that an entity of a country, which shares land border with India or the beneficial owner of an investment into India who is situated in or is a citizen of any such country, shall invest only with the Government approval:

Provided further that, a citizen of Pakistan or an entity incorporated in Pakistan shall invest only under the Government route, in sectors or activities other than defence, space, atomic energy and such other sectors or activities prohibited for foreign investment:

Provided also that in the event of the transfer of ownership of any existing or future FDI in an entity in India, directly or indirectly, resulting in the beneficial ownership falling within the restriction or purview of the above provisos, such subsequent change in beneficial ownership shall also require government approval.

Amendment to curb the opportunistic takeover

❖ Implication of the amendment:

- India shares land border with several sovereign countries such as China, Bhutan, Nepal, Pakistan and Afghanistan.
- Accordingly, investment by citizens or entities incorporated in abovementioned countries can make investment in Indian Companies under Government Approval Route. Even if beneficial owner is situated in the abovementioned country then too approval is required.
- It is to be noted that term ‘beneficial ownership’ as such has not been defined under NDI Rules.
- Even transfer of existing FDI or future FDI would also required prior approval.

❖ Poser:

- Is prior Government approval required when investment is made by an entity situated in say Hong Kong, Macau or Taiwan?
- Whether this restriction is only for FDI or equally applicable for FPI investment/ investment into an Indian LLP/ Non-repat. Investment by NRIs?

Caution/ De-Caution listing of Exporters – A. P. (DIR Series) Circular No. 03 dated 09.10.2020

Erstwhile Position	Revised Position
<p>Criteria laid down for cautioning / de-cautioning of exporters in EDPMS are as under:</p> <ul style="list-style-type: none"> • If any shipping bill remained open for > 2 years in EDPMS provided no extension is granted. • However, once related bills are realised and closed or extension is granted, the exporter will automatically be de-caution listed. • Exporters can also be caution listed even before the < 2 years period based on the recommendation of AD. Recommendation may be based on cases where exporter has come to adverse notice of the ED / CBI / DRI /any such other law enforcement agency or the case where exporter is not traceable or not making any serious efforts for realisation of export proceeds. • RBI will caution / de-caution based on the recommendation of AD Bank. 	<p>An exporter would be caution-listed by the RBI based on the recommendations of the AD bank depending upon the exporters track record with the AD bank and investigative agencies.</p> <p>The AD bank would make recommendations in this regard to the Regional Office concerned of the Foreign Exchange Department of the RBI in case the exporter has come to the adverse notice of ED/ CBI/ DRI /any such other law enforcement agency and/or the exporter is not traceable and/or is not making sincere efforts to realise the export proceeds.</p> <p>The AD Bank would also make recommendation for de-caution listing an exporter.</p>

Practical Issues under FEMA



Practical Issues

- Lack of domain knowledge even amongst professionals – legal, accounting, secretarial & financial.
- Contraventions exposed only during legal due diligence / FEMA audit.
- Numerous and frequent changes in legislation by RBI & CG (for e.g. FDI changes).
- Grey areas under regulations leading to uncertainty (for e.g. overseas branch regulations, round tripping, LRS ODI vs. LRS Portfolio Invst).
- No direct interface with RBI. Interaction only through AD. Applicable to compliance procedures as well as approvals. Absence of citizen charter for prescribing timelines.
- On several instances, have encountered ill-equipped teams of AD. Differential internal guidelines for additional documentation by AD.
- Increasing overreach of ED.
- Difficulty in conveying complex FEMA Regs to overseas investors.
- Incongruity between compliance procedures – online vis-à-vis offline.

Case Studies



Case Study 1: Returning Indian

Facts: Mr. Patel is intending to return to India on 15th December 2020 from UK after spending 10 years in UK. While staying in UK, he used to visit India every year for about 15-20 days during the Christmas holidays to spend some time with his parents in India. He currently owns the following assets in India and outside India:

FCNR(B) a/c	\$ 2,20,000/-
NRE FD a/c	Rs. 37,50,000/-
NRE Savings a/c & NRE PIS a/c	Rs. 3,50,000/-
NRO a/c	Rs. 3,50,000/-
Barclays Savings a/c in UK	£ 28,000/-
Shares of Apple Inc.	200 shares
Shares of Reliance Industries	1500 shares
Immovable Property in UK	1 Apartment in London
Immovable Property in India	1 Flat in Mumbai

Question: Kindly advise Mr. Patel about his residential status and attached consequences of his return to India during the FY 2020-21 under FEMA.

Case Study 2: ODI through cash currency

Facts: YZ Pvt. Ltd. an Indian company undertakes Software Development as its business. Mr. A and Mr. B are promoter-directors of the company. While on a business trip to Singapore in the year 2017, Mr. B incorporated a local company as overseas WOS of YZ Pvt. Ltd. with SGD 100 as share capital. The company commenced its operations immediately and has already earned handsome profits for Dec y/e 2017 and 2018.

The matter came to the notice of ED and it is investigating the matter to verify the bona fides of source of funds invested as share capital as well as its business operations. Upon being questioned by ED, Mr. B has replied that he had borrowed SGD 100 from Singaporean consultant for investment on behalf of YZ Pvt. Ltd. as share capital.



Question: What are the FEMA consequences under this case?

Case Study 3: Inheritance of assets

Facts: An Indian resident incorporated a Private limited company in India somewhere in 1980s. It has now become an Indian conglomerate. The promoter has become NRI recently and as a measure of succession planning, wants to gift his shareholding to his children. His son is PRI whereas his daughter is PROI.



Question: Can he gift his promoter shareholding in Indian company to his children?

Case Study 4: Investment in Overseas Property

Facts: Mr. N, a person resident in India is into the business of cutting and polishing diamonds. As the Indian real estate sector is not as impressive as it was, Mr. N is contemplating to buy a house property in New Jersey, USA. Mr. N wants to purchase an under construction property for a total consideration of USD 5,30,000/-. The developer will call for initial remittance of USD 80,000/- and thereafter call for remaining amount in equal instalments per quarter totalling to twelve instalments over twelve quarters.



Questions: Whether Mr. N is permitted to acquire the said property in New Jersey, USA on an instalment basis?

Case Study 5: Utilisation of LRS funds

Facts: Mr. Singh is on the lookout for good investment opportunities outside India. Towards this end, he has opened a foreign bank account in USA under LRS and remitted \$1,00,000 into that account during FY 20-21. After making the remittance, he found out that a family friend in USA has suffered huge losses due to Covid-19 disruption in the hospitality industry and needs funds as a stop gap arrangement to save his business. Out of friendship, Mr. Singh lent funds to the LLC owned by his friend for a period of 2 months.



Question: Whether Mr. Singh's actions are compliant with FEMA?

Thank you



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